be justified at all, by factors which are more or less peculiar to savings bank deposits in trust. See *Beaver* v. *Beaver,* 117 N. Y. 421, 430-1. Voluntary transfers in trust have been treated as revocable in a number of cases. There have been cases of voluntary settlement or gift in trust without express power of revocation in which the court has seemed to place upon the beneficiary the burden of proving that the donor intended to make the gift irrevocable. See *Couts* v. *Acworth,* 8 Eq. 558; *Everitt* v. *Everitt,* 10 Eq. 405; *Garsney* v. *Mundy,* 24 N. J. Eq. 243; *Rick's Appeal,* 105 Pa. 528. These cases were cases of unusual hardship, however, in which the donor might have been relieved without recourse to so dubious a principle. Compare *Massey* v. *Huntington,* 118 Ill. 80. It has sometimes been said that the omission from a voluntary disposition in trust of a clause reserving a power of revocation raises a presumption that it was omitted by mistake. See *Russell's Appeal,* 75 Pa. 269; *Aylsworth* v. *Whitcomb,* 12 R. I. 298. But such statements are believed to be unsound on principle and opposed to the weight of authority. See *Sands* v. *Old Colony Trust Co.,* 195 Mass. 575; *Souverbye* v. *Arden,* 1 Johns. Ch. 240.

It may be urged, of course, with some plausibility, that the evidence in the instant case, although meager, indicated more than anything else an intention to make a gift in trust for the eldest son at the donor's death in case the donor died without revoking. This construction appeals to the present writer as a very dubious one. Why imply a power of revocation in an executed gift to one to be held "in the event of the donor's death" in trust for another? Nothing is more certain than death. The qualifying clause is an appropriate way of indicating the time at which the beneficiary's interest is to commence. Why attribute to it any greater significance? Compare *Massey* v. *Huntington,* 118 Ill. 80; *Viney* v. *Abbott,* 109 Mass. 300. Probably the case should be viewed as another manifestation of a somewhat curious reluctance to commit irrevocably one who has made a voluntary declaration or transfer in trust. So regarded the principle of the decision seems clearly objectionable. The only authority cited by the Court, *Sterling* v. *Wilkinson,* 83 Va. 791, was really a case of imperfect gift which the court could not perfect after the donor's death, and anything said about implied power of revocation seems to have been mere dictum. Everyone would agree at the present day that equity has taken a sound position in refusing to give effect to imperfect gifts. But has not the pendulum swung too far when revocability is implied as readily as in the instant case? It would be unfortunate if pawnship equity should be permitted to impair the stability of gifts in trust. R. E. G.

ANIMALS—DAMAGES BY TRESPASSING CHICKENS.—P alleged he had a large feed barn, filled with grain, and a garden with growing vegetables, on his lot surrounded by a lawful fence four and one-half feet high, over which some of D's 400 chickens crossed from her adjoining lot, and destroyed grain and vegetables to the value of $600. The trial court sustained D's demurrer. Reversed. *Adams Bros.* v. *Clark* (1920), — Ky. —, 224 S. W. 1046.

The court says: "By the common law of England the owner of domestic animals, including fowls, was required to keep them on his own premises, and was liable for their trespass on the lands of another." This common law, as it was in 1607 (4 James 1), was the common law of Virginia, and later, when the State of Kentucky was formed, by constitutional provision became the common law of that state.

The court also said that while a statute provided "no recovery could be had for the destruction of property [by trespassing animals], unless it was surrounded by a fence four and one-half feet high, so close that cattle could not creep through," applied to *cattle,* and had not changed the common law as to fowls. Also, that the storing of grain on P's premises was not an attractive nuisance and an invitation to D's chickens to enter and eat thereof.

A pathetic argument was made on behalf of the chicken owner that she was trying to bring down the high cost of living for her family by engaging in the chicken industry. The court, however, thought the plaintiff's efforts to bring down the high cost of living of his family by raising garden truck was equally commendable, and he should not be expected to feed his neighbor's chickens also.

The court cites several cases involving horses, cattle, and hogs. The only *fowl* cases cited are *State* v. *Bruner* (1887), 111 Ind. 98, to the effect that a *fowl* is an *animal* within the statutes relating to cruelty to animals; and *McPherson* v. *James* (1896), 69 Ill. App. 337, holding that the owner of *turkeys* is liable for damages in trespass on a neighbor's unfenced property, although not for a penalty for allowing them to stray, under statute naming certain domestic animals, but not turkeys.

That a fowl is an animal within cruelty and similar statutes is generally held. *Holcomb* v. *Van Zylen* (1913), 174 Mich. 274, Ann. Cas. 1915 A 1241, with note.

There are very few cases holding that the owners of trespassing fowls are liable for the damages they do; most of the cases are those holding that the person on whose property they trespass has no right to kill them. *Johnson* v. *Patterson* (1840), 14 Conn. 1 (poisoning trespassing chickens, defendant liable); *Matthews* v. *Fiestel* (1853), 2 E. D. Smith, N. Y. 90 (poisoning trespassing geese); *Clark* v. *Keliher* (1871), 107 Mass. 406, 409 (no right to kill trespassing chickens); *Reis* v. *Stratton* (1887), 23 Ill. App. 314; *State* v. *Porter* (1893), 112 N. C. 887 (killing trespassing pigeons is cruelty to animals); *State* v. *Neal* (1897), 120 N. C. 613 (trespassing chickens could be impounded at common law, and needlessly killing them is cruelty to animals); *James* v. *Tindall* (1913), 27 Del. 413.

In *Taylor* v. *Granger* (1896), 19 R. I. 410, it was held that *case* instead of *trespass* was the proper action where a city negligently allowed the pigeons from one of its parks to fly over and defile plaintiff's premises and annoy him by the noise. In *Lapp* v. *Stanton* (1911), 116 Md. 197, an allegation in an action of trespass that defendant's game chickens continually trespassed on plaintiff's premises, roosted in his shed and on his new wagons and plows, etc., to his damage, was held to be sufficient on demurrer.

It was early held in Missouri, Iowa, and many other states that the common law relating to trespassing cattle was not suited to their condition, and was not in force in those states. *Gorman* v. *Pacific R.*, 26 Mo. 441; *Waagner* v. *Bissell*, 3 Ia. 396. In such states there are fencing statutes that affect the subject materially. See note 3, BL. COMM. 211 [Lewis's Ed.].

In *Evans* v. *McLalin* (1915), 189 Mo. App. 310, where a farmer's chickens were alleged to have trespassed and destroyed a neighbor's crops, a demurrer was sustained, and the owner of the chickens was held not liable. This is based on the statute, and although directly in conflict with the principal case, admits the common law to be as ruled in that case.

In *Keil* v. *Wright* (1907), 135 Ia. 383, an injunction was asked against the owner of chickens which repeatedly trespassed on plaintiff's premises and destroyed his crops. The defendant denied the facts, and claimed that, since he was solvent, an action at law would be an adequate remedy. The trial court found for the plaintiff and granted the injunction. In the supreme court the defendant, in argument, urged that "chickens were commoners" and had a right to roam at will without being considered trespassers. The court refused to rule on this, since it was not pleaded nor considered by the trial court, and so affirmed the decision of that court. Six years later, in *Kimple* v. *Schafer* (1913), 161 Ia. 659, relying on the *Keil* case, plaintiff asked an injunction to restrain the defendant from permitting his 200 chickens to trespass on plaintiff's land and eat the oats he had planted there to such an extent that he was obliged to resow it two or three times. The defendant pleaded that "chickens were free commoners, and that the owners of cultivated land must fence against them"; that plaintiff had no lawful fence enclosing his land; and that his remedy, if any, was impounding or suing for damages. The court, by Deemer, J., affirms the *Keil* case and holds that an injunction will lie to prevent domestic animals from trespassing. He also says that at common law the owner must keep his domestic animals at home; that trespass would lie for failure to do so; that the animals could be impounded; that these rules were early held inapplicable in Iowa; that the matter was now regulated by statute, in reference to several kinds of domestic animals; that nothing had been done as to chickens, except in cities, indicating that in the country chickens are free commoners, and they, turkeys, ducks, geese, peacocks, and guinea hens have been so considered from the beginning of the state; that it is much easier to fence poultry out than to fence it in; and that until the legislature made it obligatory the court would not adopt a rule requiring the owner to fence them in, nor enjoin him from permitting them to escape.

In all these cases it is assumed that the common law allowed an action for damages, or distress damage feasant, for injuries done by trespassing domestic animals. This is undoubtedly true as to horses, cattle, sheep, and hogs. Yet by the laws of Ine (c. 690), if a ceorl's close "be unfenced and his neighbor's cattle stray in through his own gap, he shall have nothing from the cattle; let him drive it out and bear the damage; but if there be a beast which breaks hedges and goes in everywhere, and he who owns it

will not or cannot restrain it, let him who finds it in his field take it out and slay it, and let the owner take its skin and flesh, and forfeit the rest." Ll. 40, 42. The Welsh law was similar. I THORPE'S ANCIENT LAWS AND INST. 127.

In the year books of Ed. II (1307-1326) there are numerous cases of replevin for cattle taken damage feasant, indicating that it was a common remedy at that time; and in *Boyden* v. *Alspath* (1308), Y. B. 2 Ed. II, 87, pl. 29, a trespassing ferret might be taken damage feasant; also a greyhound. *De la More* v. *Thwing* (1308), Y. B. 2 Ed. II, 176, pl. 98a. In 1481, Y. B. 20 Ed. IV, fo. 10b, where D had common in 200 acres of land adjoining P's land, and D's beasts entered P's unenclosed land without D's knowledge, being driven there by wild dogs, and did damage, Brian, C. J., and Littleton, J., held D was liable in trespass for the damage done, and the fact that the wild dogs chased the cattle there made no difference. A hundred years later the law was stated the same, relying on this case. *Dyer*, 372, pl. 10 (1581). It seems the law has been thus since that time as to trespassing cattle, those dangerous to crops. There seem to be no *chicken* cases in England.

In the Welsh law above referred to it was said: "The owner must make his garden so strong that beasts cannot break into it; and if it be broken into there can be no redress, *except for the trespass of poultry and geese.*" I THORPE, 127, note.

In *Boulton's Case* (1597), 5 Co. 1046, it was stated that one was not liable for making a dove-cot from which the pigeons trespassed on the neighbor's land. This, however, was said to be contrary to Y. B. 4 H. VI, pl. 10, and 27 Ass., pl. 6; and in *Dewell* v. *Sanders* (1619), Cro. Jac. 492, 79 Eng. Rep. 419, Doderidge, Croke, and Houghton, JJ., agreed that if pigeons come upon my land I may kill them, and the owner has no remedy. Montague, J., held *contra*, for the owner has a property in the pigeons. In *Taylor* v. *Newman* (1863), 4 B. & S. 89, 122 Eng. Rep. 343, the *Dewell* case was affirmed. And in *Webb* v. *McFeat* (1878), 22 Jour. Juris. (Sc.) 669, the owner of a carrier pigeon was held to have no remedy when it was killed by D's cat, both the pigeon and the cat trespassing on neutral ground at the time. So in *McDonald* v. *Godfrey* (1890), 8 Pa. Co. Ct. 142, the plaintiff had no remedy for the killing of his canary, on his own premises, by the defendant's trespassing cat.

On the other hand, in *Ferrer* v. *Nelson* (1885), 15 Q. B. D. 258, Pollock, J., held that one was liable in case for overstocking his land with 1,500 pheasants so that 300 of them trespassed on plaintiff's premises and injured his crops. In *Hadwell* v. *Righton* (1907), 76 L. J. (K. B.) 891, where a bicyclist was injured by a fowl flying into his wheel, in the road, the court seemed to think that the owner of the chicken might have been liable if it had been trespassing at the time.

In *Boulton's Case*, above, it was held that overstocking D's ground with rabbits, which strayed on P's premises and did damage, did not make D liable, for P might kill them. This is contrary to the *Ferrer* case, above.

Compare *Stearn* v. *Prentice* (1918), 68 L. J. (K. B.) 422 (defendant not liable for the depredations of rats harbored in his boneyard).

It is generally held that one is not liable for the mere trespass of his dog, not known to be dangerous to persons; ordinarily, of course, a dog is not dangerous to crops. *Brown* v. *Giles* (1823), 1 Car. & P., 28 R. R. 769; *Woolf* v. *Chalker* (1862), 31 Conn. 121, 128; *Read* v. *Edwards* (1864), 17 Com. B. N. S. 245; *Sander* v. *Teape* (1884), Q. B., 51 L. T. N. S. 263; *Buchanan* v. *Sweet* (1908), 108 N. Y. S. 38; *Van Etten* v. *Noyes* (1908), 112 N. Y. S. 888; *Doyle* v. *Vance* (1880), 6 Vict. L. R. 87, *contra.*

Similar rulings have been made as to *deer, Keilway*, 30, Y. B. 10 Hen VII, 6, pl. 12 (1495); *Brady* v. *Warren* [1900], 2 I. R. 632, 661; *State* v. *Ward*, 170 Ia. 185; and as to *bees, Brown* v. *Eckes*, 160 N. Y. S. 489; *Earl* v. *Van Alstine* (1858), 8 Barb. 630; *O'Gorman* v. *O'Gorman* [1903], 2 I. R. 573.

Of course, fowls may become a nuisance because of the dust, odor, or noise they cause. *Ireland* v. *Smith* (1895), 3 Sc. L. T. Rep. —, 33 Scot. L. R. 156; *Desmond* v. *Smith*, 9 GREEN BAG, 550, 41 Sol. J. 167.

It is submitted the common law, as set forth in the principal case, should be considered the correct rule, where damage is done by any such animals in the exercise of their well-known natural propensities, unless due to the intervening act of God or the independent act of some third party, or similar excuse. See "Responsibility at Common Law for Keeping Animals," THOMAS BEVEN, 22 HARV. L. REV. 465; ROBSON, TRESPASS BY ANIMALS.

H. L. W.

FUTURE INTERESTS IN RECENT STATUTES AND CASES—REMAINDERS, DEVISES AND USES.—To the layman, or the beginner in the study of property law, the intricate sinuosities of *Shelley's Case* and *Archer's Case*, of contingent remainders and their destructibility, of indestructible executory devises and uses, springing and shifting, seem inexplicable, incomprehensible, and useless. But a longer estate than for the life of him who must perform the feudal services on which his tenure rested is a concept that would have seemed equally strange and impossible either to lay or legal mind when feudalism was in fullest flower. Pure feudalism had no room for future estates, but only for present holdings, based on present services, to be performed by the present tenant while he lived. An estate to A was not an estate for A to pass to another, either *inter vivos* or at death, but to keep, and only while he performed the personal services that went with it. When estates to A and his heirs came to be recognized the concept was still of a life estate to A, and "to his heirs" merely indicated that at the end of A's life the estate in natural course would go to him who should be his heir, and so on in indefinite succession. 15 COL. L. REV. 680.

It was a sign that feudalism was already beginning to crumble when it began to be suggested that an estate might be created carrying a present interest in A and a future interest in his heirs, and the development of the concept was a long process. It is more than possible that the rule in Shel-